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No. 10-735

IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC., ET AL.,
Petitioners,

v.

DEANIA M. JACKSON,
ON BEHALF OF HERSELF AND
ALL OTHER PERSONS SIMILARLY SITUATED,
Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Fourth Circuit Court Of Appeal

SUPPLEMENTAL BRIEF FOR PETITIONERS

PAUL D. CLEMENT
Bancroft PLLC
1919 M Street, N.W.
Washington, D.C. 20036
(202) 234-0090

PHILLIP A. WITTMANN
DOROTHY H. WIMBERLY
Stone Pigman Walther Wittmann L.L.C.
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

Counsel for R. J. Reynolds Tobacco Company

ALAN E. UNTEREINER
Counsel of Record
MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

MIGUEL A. ESTRADA
AMIR C. TAYRANI
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Philip Morris USA Inc.

[Additional Counsel Listed on Inside Cover]

MARK A. BELASIC
KEVIN D. BOYCE
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114-1190
(216) 586-3939

Counsel for R. J. Reynolds Tobacco Company

CARMELITE M. BERTAUT
Stone Pigman Walther Wittmann L.L.C.
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

RICHARD A. SCHNEIDER
ASHLEY C. PARRISH
King & Spalding LLP
1180 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 572-4600

Counsel for R. J. Reynolds Tobacco Company and Brown & Williamson Holdings, Inc. (formerly Brown & Williamson Tobacco Corporation, individually and as successor by merger to The American Tobacco Company)

CHARLES F. GAY, JR.
RONALD J. SHOLES
MARTIN A. STERN
JEFFREY E. RICHARDSON
Adams and Reese, LLP
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

Counsel for Philip Morris USA Inc. and the Tobacco Institute, Inc.

STEVEN W. COPLEY
Gordon, Arata, McCollam, Duplantis & Eagan, LLC
201 St. Charles Avenue
Suite 4000
New Orleans, LA 70120
(504) 582-1111

GARY R. LONG
JENNIFER L. BROWN
Shook, Hardy & Bacon, L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550

Counsel for Lorillard Tobacco Company

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

On June 20, 2011, this Court issued its opinion in *Wal-Mart Stores, Inc.* v. *Dukes*, No. 10-277, reversing the Ninth Circuit's decision and holding that class certification in that case violated Federal Rule of Civil Procedure 23. In light of that ruling, the question here is simply whether the Court should (1) grant plenary review, or (2) grant the petition, vacate the decisions below, and remand this case for further proceedings. The former course is clearly the proper one. Indeed, this Court's decision in *Wal-Mart* makes plenary review here even more imperative.

By resting its decision on Rule 23 and the Rules Enabling Act, this Court in *Wal-Mart* avoided the need for a ruling on the constitutional limits on the use of class actions to adjudicate claims fundamentally ill-suited for class treatment. At the same time, by recognizing restrictions on the use of class actions in federal courts, the Court increased the incentives for class-action lawyers to push the limits in state court. The need for clarification of the constitutional limits on deviations from the representational model of class litigation is thus more pressing than ever.

This case is an ideal vehicle for providing such clarification: The decisions below reflect a radical deviation from the model of class-action litigation reflected in the conception of Rule 23 reaffirmed in *Wal-Mart*. What the requirement of commonality and the strictures of the Rules Enabling Act would flatly forbid in federal court was openly embraced in the decisions below. Procedure was allowed to trump substantive rights and distinct features of individual claims—for example, that the class representatives

could not show reliance on any defendant's action and had quit smoking prior to trial—were ignored to facilitate adjudication on a class-wide basis. In *Wal-Mart*, the Court made clear that this could not happen in federal court. This Court should grant plenary review to decide whether due process will allow this to transpire in state court.

1. Although both sides in *Wal-Mart* argued due process principles (see, *e.g.*, Pet. Br. 15, 36, 38, 43, 47, 55, 56; Resp. Br. 41, 47-48, 52-54; Pet. Reply Br. 14, 17-18, 20), the Court's opinion resolved the issues presented principally on the basis of Rule 23 itself. More particularly, the Court first held that the plaintiffs had failed to demonstrate commonality, as required by Rule 23(a)(2). Slip op. 8. The Court noted the plaintiffs' inability to identify a common reason *why* individual employees had suffered allegedly adverse employment action, and the Court pointedly rejected plaintiffs' reliance on "statistical and anecdotal evidence" to fill that void. *Id.* at 16. "Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity," the Court concluded, "does not suffice." *Id.* at 17.

The Court further held (unanimously, in this regard), that the plaintiffs' "claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2)." Slip op. 20. The Court concluded that adjudicating such claims would impermissibly evade the protections Rule 23(b)(3) affords to monetary claims, explaining that the "absence of notice and opt-out" procedures for monetary claims litigated under (b)(2) "violates due process." *Id.* at 23. The Court declined to decide, however, "whether there are any forms of 'incidental' monetary relief that are consistent with [its] interpretation of Rule 23(b)(2) and that comply with the Due Process

Clause," because the plaintiffs had not contended that they could meet such a standard. *Id.* at 26. The Court also unanimously declared that "Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay" (*ibid.*), rejecting the Ninth Circuit's proposal to "replace" an actual individualized determination "with Trial by Formula" (*id.* at 27). Such proceedings, the Court explained, would violate the Rules Enabling Act's express prohibition against "interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Ibid.* (quoting 28 U.S.C. § 2072(b) and citing *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999)).

2. Because the *Wal-Mart* decision relied principally on Rule 23, the important and recurring federal constitutional issue presented in this case—"Whether the Due Process Clause prevents state courts from employing the class-action device to eliminate fundamental substantive and procedural protections that would otherwise apply to adjudications of class members' individual claims" (Pet. i)—remains unresolved. The obvious incentives the decision creates to move the most radical of class action theories to state court makes resolution of that question more critical than ever.

To be sure, the foundations of Rule 23 are constitutional (see, *e.g.*, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 626 n.20 (1997)), and the unanimous portion of the Court's opinion in *Wal-Mart* confirmed as much (slip op. 26). One of Rule 23's critical features that keeps federal class actions within constitutional bounds is that it confines class actions to contexts in which mass adjudication is truly representative. Only if the trial of the class representatives' claims really does suffice to try those of absent class members will *all* parties—

plaintiffs and defendants alike—be afforded the opportunity to be heard that is at the very core of due process. See Pet. 14-19. The robust requirements of commonality embraced by *Wal-Mart* (together with the related principles of typicality, slip op. 8, n.5) play a critical role in ensuring class action litigation is truly representative litigation, as due process requires.

By its terms, however, Rule 23 of course does not squarely govern state proceedings. Nor does the Rules Enabling Act, which played a critical role in this Court's Rule 23(b) holding. There clearly are constitutional limits on the extent to which the class-action device can be used to deviate from the traditional model of representational litigation. The *Wal-Mart* decision confirms this. And the decisions below plainly crossed the constitutional line. The *Wal-Mart* decision only increases the need for this Court to weigh in and clarify what the Constitution permits when state courts sanction class actions that Rule 23 and the Rules Enabling Act would clearly forbid.

Large numbers of class actions continue to be filed in state courts, which have demonstrated a persistent willingness to deviate from traditional methods of adjudication. See Pet. 31; DRI Br. 12-14; U.S. Chamber Br. 14-16. The Court's holding in *Wal-Mart*—prohibiting those same class actions in federal courts—will only exacerbate that trend. That is particularly true given *Wal-Mart*'s explicit recognition that "individualized determinations" (slip op. 26) and "individual affirmative defenses" (*id.* at 27) cannot be cast aside just to facilitate class adjudication. State courts will inevitably face still greater numbers of lawsuits seeking to employ this and similar tactics to accommodate class actions that

have no home in federal court. "The extent to which class treatment may constitutionally reduce the normal requirements of due process" therefore remains "an important question." *Philip Morris USA, Inc.* v. *Scott*, No. 10A273, slip op. at 3 (U.S. Sept. 24, 2010) (Scalia, J., in chambers).

Moreover, there is little reason to believe that the Louisiana courts will heed the example laid out in *Wal-Mart*—if they are willing to reconsider their prior holdings at all. Indeed, notwithstanding the due process concerns that animate Rule 23, respondent here has repeatedly denied that the lessons of Rule 23 suggest any meaningful limitation on what state courts may do in the name of adjudicating a class action (see, *e.g.*, Br. in Opp. 1 n.1, 18-19; Stay Opp. 18), and the lower courts have consistently ignored such guideposts. As previously explained (Pet. 4-12), petitioners have vigorously advanced their due process rights at every turn—including through multiple trips to the Court of Appeal and the Louisiana Supreme Court. Petitioners have also repeatedly invoked Rule 23's example to illustrate the constitutionally adequate path. All to no avail: The decisions below simply gave these arguments the back of the hand, or ignored them altogether. See, *e.g.*, Pet. App. 46a-50a, 199a-200a.

* * *

Wal-Mart rightly concluded that Rule 23 does not countenance radical departures from the essential representative character of a traditional class action simply to make mass adjudication "work." The Court should take this valuable opportunity—in a rare class action case tried to final judgment—to make clear that due process likewise prohibits state courts from abandoning the essential principles of class

adjudication by simply lopping off elements and defenses that would indisputably apply in an individual adjudication. That question remains more pressing than ever, and the state courts remain badly in need of explicit guidance from this Court.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set down for argument next Term.

Respectfully submitted.

PAUL D. CLEMENT
Bancroft PLLC
1919 M Street, N.W.
Washington, D.C. 20036
(202) 234-0090

PHILLIP A. WITTMANN
DOROTHY H. WIMBERLY
Stone Pigman Walther Wittmann L.L.C.
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

Counsel for R. J. Reynolds Tobacco Company

ALAN E. UNTEREINER
Counsel of Record
MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

MIGUEL A. ESTRADA
AMIR C. TAYRANI
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Philip Morris USA, Inc.

MARK A. BELASIC
KEVIN D. BOYCE
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114-1190
(216) 586-3939

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CARMELITE M. BERTAUT
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RICHARD A. SCHNEIDER
ASHLEY C. PARRISH
King & Spalding LLP
1180 Peachtree Street, N.E.
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(404) 572-4600

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CHARLES F. GAY, JR.
RONALD J. SHOLES
MARTIN A. STERN
JEFFREY E. RICHARDSON
Adams and Reese, LLP
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

Counsel for Philip Morris USA Inc. and the Tobacco Institute, Inc.

STEVEN W. COPLEY
Gordon, Arata, McCollam, Duplantis & Eagan, LLP
201 St. Charles Avenue
Suite 4000
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GARY R. LONG
JENNIFER L. BROWN
Shook, Hardy & Bacon, L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550

Counsel for Lorillard Tobacco Company

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